SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 732

ARTHUR ATHENS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Supreme Court of the United States:

Petitioner, Arthur Athens, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on December 21, 1961.

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit has not been officially reported F. 2d . Its opinion is annexed hereto as the appendix. The aforementioned judgment affirmed the judg-

ment of conviction had in the United States District Court for the Southern District of Texas dated the 24th day of February, 1961, which, after a verdict of a jury, adjudged the petitioner guilty of violating the Narcotics Laws of the United States relating to marihuana and of conspiracy to violate the same statute, Title 21 U.S.C. 176a. The petitioner was sentenced to a term of ten years imprisonment for each of the aforementioned violations, said terms of imprisonment being concurrent. No opinion was rendered by the District Court.

A petition for rehearing was made to the United States Court of Appeals for the Fifth Circuit. The petition was filed timely on January 10, 1961. The petition for rehearing requested, among others that the said Court of Appeals rehear the matter en banc. This application was denied on January 22, 1962. On January 25, 1962, the Court of Appeals for the Fifth Circuit entered an order staying issuance of its mandate, pending determination of petitioner's application in this Court for a Writ of Certiorari.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Where the petitioner was charged with a substantive and a conspiracy count, both charges arising under Section 176a of Title 21, U.S.C., was it proper for the Trial Court to submit the cause for the Petit Jury's determination on the legal theory of the existence of circumstantial

evidence when in fact and in law no evidence, direct or circumstantial, existed, either connecting him with the alleged conspiracy or the substantive count alleged?

2. May the trial court in its charge to the jury, as it did in the instant case, assume that there was "circumstantial evidence" from which the jury might decide the guilt or innocence of the petitioner, thus usurping the function of the trial jury viz.: to determine whether there is any evidence which might connect a defendant with the crime charged, then: if such finding be made by the trial jury to determine whether or not such evidence is sufficient to warrant a finding beyond a reasonable doubt that the defendant is guilty? (R. p. 241*)[1]

3. Has the Due Process Clause of the Fifth Amendment of the Constitution of the United States become meaningless and been rendered impotent by reason of the repeated refusal of this Court to grant certiorari in cases involving conviction under federal jurisdiction where the issue of "Due Process" was urged and is the only purposeful "Due Process" Clause remaining, that contained within the Fourteenth Amendment to the Constitution of the United States?

(a) Must a person, convicted of violation of Federal Criminal Statutes by surmise, conjecture, suspicion, and guess, abandon all hope of having his conviction and the matters of law inherent thereto passed upon by the Supreme Court of the United States or may he hope to sucessfully petition for relief with equality

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* Matter contained within parentheses ( ) preceded by "R" refers to pages contained within the record in the Court of Appeals.

[1] " * * * But the evidence does show circumstances from which you might infer and conclude their guilt."

with those convicted of minor offenses under the provisions of City Ordinances or State Laws? (See *Garner* v. *Louisiana*, U.S. , 7 L. ed. 2d 207 [12-11-61]; *Thompson* v. *Louisville*, 362 U.S. 199, 4 L. ed. 2d 654.)

4. Where a co-defendant, testified on her own behalf in an effort to exculpate herself, and gave no testimony of a direct incriminatory nature against the petitioner, may her testimony be deemed "circumstantial evidence" against the petitioner and be evaluated as such by the Trial Jury?

(a) Was not the Court of Appeals for the Fifth Circuit in error when it characterized the co-defendant's testimony as testimony offered on behalf of the petitioner?

5. Where the co-defendant had testified that she saw petitioner almost every day, that he had never mentioned to her a prior trip to Texas or Mexico (R. pp. 129-132), was it not improper and prejudicial to permit the government to introduce as rebuttal, through the testimony of a Mrs. Betty Lou Collins, evidence that petitioner had on August 5, 1960 rented an automobile in San Antonio, Texas, purportedly for a trip to Mexico?

(a) Was not this testimony respecting a purely collateral matter?

(b) Having been offered as alleged "rebuttal evidence" concerning the co-defendant, did not the trial judge err when he permitted the government, over the objection of counsel, to argue to the jury in summation that the jury might infer from this evidence that petitioner had made a prior trip into Mexico for the purpose of smuggling marihuana into the United States? (R. p. 235)

(b) Was not this error compounded and magnified to the jury, when, after objection, the Trial Court commented that "I believe counsel may argue to that effect"? (R. p. 235)

6. Upon the evidence presented on the trial was not the failure of the Government to show actual or constructive possession of any marihuana by the petitioner fatal to this prosecution for violation of the Narcotics Laws of the United States under Title 21 U.S.C. §176a and Title 18 U.S.C. §2?

Statutes and Constitutional Provisions Involved

TITLE 21, SEC. 176a. SMUGGLING OF MARIJUANA; PENALTIES; EVIDENCE; DEFINITION OF MARIHUANA

Notwithstanding any other provision of law, whoever, knowingly with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

TITLE 18, SEC. 2.—PRINCIPALS—

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES—

"No person shall be held to answer for a capital, or otherwise infamous crime * * * nor be deprived of life, liberty, or property, without due process of law; * * * "

Reasons for Granting the Writ

The petitioner, a young man of 28 years, never previously in conflict with the law, was found guilty under both counts of the Indictment and sentenced to ten year concurrent terms on each count. The horrible enormity confronting him is overwhelming. The factual discussion hereinafter set forth clearly establishes that there existed no evidence against the petitioner sufficient to warrant the submission of the charges to the trial jury.

The state of this record is frightening and it is difficult to believe that such a travesty could happen in the United States of America in this enlightened day and age.

The petitioner saw fit to exercise his privilege and did not testify in his own behalf. In view of the lack of evidence against him, this position was sound. His co-defendant elected to testify in an obvious effort to rebut the presumption existing against her under the provisions of §176a of Title 21.

During cross-examination of the female co-defendant, several collateral matters were explored. She stated, as appears supra, under "Questions Presented", that petitioner had never informed her of a prior trip to Texas and Mexico, although she had seen him practically every day. Under the guise of contradicting and discrediting the co-defendant, the government established that in August of 1960, two months prior to the incident referred to in the Indictment, petitioner had rented an automobile in San Antonio, Texas, for the asserted purpose of making a trip into Mexico and had returned the said rented automobile to a branch of the rentor in Houston, Texas.

The trial judge permitted government counsel, in summation, to refer to this evidence as establishing that petitioner had previously entered Mexico for the purpose of smuggling marihuana into the United States. This was permitted over objection by petitioner's counsel.

The Circuit Court of Appeals compounded the error by characterizing the co-defendant as a witness in her own behalf and in behalf of petitioner. The introduction of this evidence and the use made of it by the government in summation was so patently improper and prejudicial to peti-

tioner as to deny him his guarantee of "due process" granted under the Fifth Amendment.

Frequently errors of this type have been brushed aside by Appellate Courts. They have stated that while "real error" occurred, it was such a miniscule part of a long and lengthy trial that it could not have in fact prejudiced the defendant. The trial of this case began February 9, 1961 and was concluded by the verdict of the jury the following day. The record on appeal consists of 286 pages, including the Charge of the Court, the Summation of both counsel, the Indictment and the Judgment of the Court. The actual testimony and colloquy had during the trial consist of approximately 207 pages. The impact of this testimony together with the improper use of it by government counsel in summation, became most prejudicial to petitioner.

This Honorable Court in the past has been reluctant to accept for review and to grant certiorari to persons convicted of violation of federal statutes, except where the question involved was novel, or one where the various circuits were in conflict.

Seldom, if ever, has there been presented to this Court for certiorari a case in which there was such a complete lack of evidence against the petitioner as appears here. The submission of the charges against the petitioner to the jury coupled with the subsequent conviction and sentence to a term of ten years shocks the sensibilities.

This Court previously has exercised its powers and taken under consideration matters involving state convictions where the sentence imposed and the penalty involved was of little or no consequence. If the petitioner is not granted certiorari in the instant case, it means that a young man,

never previously in conflict with the law, must serve, without hope of parole, (by reason of statute) ten years without having his case passed upon by this Court. Unjust imprisonment is a form of torture that is subtle but infinitely cruel.

Man's inhumanity to man is boundless. It is the function of law to bridle and correct this. This Court, in the exercise of its judicial function, may substitute understanding by electing to consider this cause.

The preservation of petitioner's constitutional rights, the sound administration of justice in the criminal courts, notice to the judges at a trial level that this court will not permit the submission to a jury of a case where no evidence, direct or circumstantial, exists, requires the granting of the requested relief. Reassurance of the Bench and Bar at large that that portion of the Fifth Amendment that guarantees that there shall be no deprivation "OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW" is as vigile today as when it was written by the founding fathers and must be observed and respected with equal vigor as the similar provision constantly referred to in these days, contained within the Fourteenth Amendment. These reasons require a determination by this Court of the issues presented by this petition.

I

Statement of the Case

The petitioner was tried under an Indictment charging him and one, Alberta Edelstein Curtis, with conspiracy to violate §176a of Title 21 (smuggle into the United States approximately 100 lbs of marihuana from the Republic of Mexico). The second count charged them with actually smuggling into the United States that quantity of mari-

huana, all of this allegedly taking place, on or about November 1, 1960, at the Port of Laredo, Texas. Upon the trial, petitioner and his co-defendant were represented by joint counsel. Each of the defendants was found guilty of both counts by the jury after approximately one and one-half trial days.[2]

It is difficult to present a statement of this case and not fall into the pitfalls which petitioner's trial counsel plunged during his summation upon the trial and appellate counsel fell again at the time of presenting the facts of the case in the brief submitted in the Court of Appeals for the Fifth Circuit.[3] Eliminating for the time being the testimony of the co-defendant, Curtis, and referring to that portion of the government's direct case, we find a total of only 60 pages in the record.

Taking the witnesses in chronological order, the government established, through Mrs. Raven (R. pp. 13-28), that on October 28, 1960, Mrs. Curtis, the co-defendant, rented an automobile in San Antonio, Texas. Mrs. Raven testified that Mrs. Curtis when asked for a deposit of $250.00 cash, became upset after counting her money, left the office and returned with petitioner. After a conversation with Mrs.

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[2] The co-defendant, Curtis, was sentenced to five years imprisonment under each count, said sentences to run concurrently; the petitioner was sentenced to ten years imprisonment under each count, said sentences to run concurrently (R. p. 302).

Petitioner is the only defendant seeking certiorari; the co-defendant, Curtis, has accepted her fate as decided by the Court of Appeals and is presently serving her sentence.

[3] This possibly occurred by reason of the fact that petitioner and his co-defendant were represented by joint counsel and it was impossible for counsel to present an argument in respect to petitioner without including an argument in behalf of the co-defendant, Curtis.

Raven petitioner gave the co-defendant the $50.00 additional needed by her for the deposit. The record established that there was no attempt by Mrs. Curtis to hide her identity and also that when the question of additional funds arose, petitioner readily entered the auto rental office with Mrs. Curtis and gave her the necessary money.

Adrian Martinez (R. pp. 29-36) testified that he was a Room Clerk at the Plaza Hotel at Laredo, Texas, and that on October 28, 1960 he registered petitioner and his co-defendant, Mrs. Curtis, under the name of "Mr. & Mrs. Artie Curtis". That they were assigned to Room 910 which was a twin bed room and that petitioner remained within the hotel most of the time until his arrest on November 1st.

Willie Pena (R. pp. 36-48), a Customs Inspector, and Fukeo Kato (R. pp. 49-56) a Plant Quarantine Inspector, testified to the events occurring at the Port of Entry on the morning of November 1, 1960 when the co-defendant, Curtis, attempted to enter the Port of Laredo. None of their testimony, in any manner, concerned the petitioner and will not be related herein.

Murrel J. Morgan (R. pp. 56-72), a Customs Agent stationed at Laredo, Texas, testified to questioning the co-defendant, Mrs. Curtis, at the International Bridge at about 1:30 in the morning. Among other things, he testified that a search of the purse of Mrs. Curtis revealed various meal tickets or bills of the Hotel Rio of Monterey, Mexico, and tickets for four telephone calls made to the occupant of Room 910 at the Plaza Hotel in Laredo, Texas. Three of these calls were made in the afternoon or evening of October 29th and the fourth call on October 30, 1960 (R. pp. 61-2).

Further investigation by Mr. Morgan at the Plaza Hotel led him to the Southland Cafe where he found the petitioner drinking coffee. Agent Morgan testified that when petitioner was asked his name he gave his true name, Arthur Athens, that he stated that he lived in New York, and had flown to Laredo by himself and was staying at the Plaza Hotel and was visiting friends by the name of Wilson at the Hotel Hamilton. Agent Morgan testified that he threatened to check the Hamilton Hotel. He advised petitioner it was known he had registered as "Artie Curtis" at the Plaza Hotel and that Alberta Curtis had been arrested at the International Bridge for possession of marihuana. Petitioner then stated to him that he knew nothing about that and that Mrs. Curtis was the wife of his employer and that he and she had registered at the Plaza Hotel as [redacted]r. & Mrs."

Further interrogation of the petitioner by Agent Morgan elicited the information that petitioner was employed in a brewery in New York City and also worked as an automobile salesman for the husband of Mrs. Curtis; that the Curtises had asked him to accompany Mrs. Curtis to Monterey and he did agree to go as far as Laredo. Mrs. Curtis' husband had arranged the plane tickets to San Antonio where Mrs. Curtis had rented an automobile; that they had driven to Laredo and checked into the Plaza Hotel. When petitioner was questioned as to how he and Mrs. Curtis would return to New York since, allegedly, she only had $44.00 in her purse, petitioner stated he would buy the plane tickets for them to return to New York.

On the 4th or 5th of November when petitioner was released on bail, he was questioned further by Agent Mor-

gan and advised the Agent that he had travelled on the plane from New York under the name of "A. Dale", a friend of his.

Cross-examination of Agent Morgan was confined primarily to the events concerning the co-defendant, Curtis. It did, however, reveal that petitioner offered no objection when permission was requested to search the hotel room occupied by him at the Hotel Plaza.

The co-defendant, ALBERTA CURTIS, testified in her own behalf (R. pp. 80-162). She also called as a witness her husband, Arthur Curtis (R. pp. 162-189).[4] During the course of their examination, each of them testified that they saw the petitioner almost daily and that he frequently spent the night at their home. On cross-examination, each of them denied that petitioner had ever advised them that he had recently been in Texas or Mexico.[4]

In rebuttal of this purely collateral issue, the government called Betty Lou Collins (R. pp. 203-211) and established through her testimony that on August 5, 1960 petitioner had rented an automobile in San Antonio, Texas, stating that he was going to make a trip into Mexico. The automobile was subsequently returned to Houston, Texas, on August 9th with the used mileage of 1037 miles. While admittedly this improper rebuttal evidence was received without objection on the part of counsel for the petitioner, counsel did make timely objection to the further improper use of this evidence in the government's summation. This has been detailed *supra* under Question 5 of the "Questions Presented".

Mrs. Curtis had also been questioned as to her knowledge, if any, of the use of marihuana by petitioner or

[4] Alberta Curtis (R. pp. 130-132); Arthur Curtis (R. p. 184).

whether or not petitioner had any connection or dealings with marihuana (R. pp. 154-6).[5]

Despite the nature of the cross-examination and the answers elicited, the government attempted, through the testimony of one, Francis Ahern (R. pp. 211-218), to introduce matter highly prejudicial and inflammatory concerning petitioner. Over objection of petitioner's counsel, Detective Ahern was permitted to testify that he had had conversation with petitioner on November 30, 1960 in the City of New York and that that conversation concerned itself with petitioner's use of marihuana.[6] Further objection was made by petitioner's counsel and the court eventually ruled that it was improper rebuttal (R. p. 217). Petitioner's counsel promptly moved for a mistrial which motion was denied (R. p. 218).

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[5] A portion of the testimony on this subject was as follows:

"Mr. Wright: Your Honor, we object to the question. The defendant Athens is not on the stand, and for her to be queried about any circumstances concerning this defendant is an objectionable question.

The Court: Overruled.

"Q. I believe your answer to that was that he had nothing to do with marijuana in your presence, is that correct? A. That's correct (R. p. 155).

Q. And then you wouldn't know whether he had had anything to do with marijuana outside your presence? A. Well, that, of course, would call for a 'no' answer. How would I know what he did when I wasn't around?

Q. Well, he never mentioned it to you? A. No" (R. p. 156).

[6] "Q. And was anything said in that conversation concerning Athens' use of marijuana? A. There was" (R. p. 214).

ARGUMENT

Petitioner Arthur Athens was denied due process of law guaranteed by Amendment V of the Constitution.

A. There was no evidence warranting the submission of the cause to the trial jury in respect to petitioner, Arthur Athens, of either count of the Indictment.

Analysis of the government's case in respect to petitioner, Arthur Athens, discloses that the only evidence concerning petitioner was the following:

1. Athens flew from New York to San Antonio, Texas, with Mrs. Curtis.
2. Athens supplied to Mrs. Curtis $50.00 in San Antonio, needed by her toward the rental of an automobile.
3. Athens registered in the Plaza Hotel at Laredo, Texas, in a twin bed room under the name of Mr. & Mrs. Artie Curtis.
4. Athens, received four telephone calls from Monterey, Mexico, from Mrs. Curtis.
5. Athens originally mis-stated to the Customs Agents that he was visiting friends at the Hamilton Hotel in Laredo, rather than admitting he was registered at the Plaza Hotel with co-defendant as Mr. & Mrs. Artie Curtis.

Petitioner, as was his right, saw fit to remain mute and did not testify; his co-defendant did. Under the common law, one, jointly indicted but not jointly tried, could not testify for the defense or for the prosecution. In *Benson* v. *United States*, 146 U. S. 325, 36 L. ed. 991, this Honorable Court established that a co-defendant, not on trial, was a competent witness for the prosecution. By law enacted by

Congress, a person charged with commission of offenses against the United States was made a competent witness.[7] In *Freeman* v. *United States*, Fifth Circuit, 1938 (96 F. 2d 13), the Court of Appeals held that where all of the co-defendants testified the jury had the right to and should consider all of the testimony in the case in determining the guilt or innocence of each defendant.

In the instant case a novel concept was introduced by the Court of Appeals for the Fifth Circuit in its opinion affirming the judgment of conviction of appellant. In relating the evidence in the case, Mr. Justice Rives stated, "Mrs. Curtis testified as a witness in her own behalf *and in behalf of her co-defendant, Athens*". (Emphasis supplied).

There is nothing in the record to support this statement or conclusion.

For obvious reasons the Court of Appeals had difficulty in resolving the facts in the instant case.[8] Defense trial counsel had difficulty in their summations in establishing a line of demarcation between the testimony concerning petitioner and that concerning his co-defendant.

It is obvious that inferences have been drawn from the "circumstantial evidence" concerning Mrs. Curtis and these inferences have been used to infer the guilt of petitioner. Guilt is individual. To establish the guilt of Arthur Athens either with respect to the conspiracy or the sub-

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[7] § 3481 of Title 18.

[8] "Because some difference of opinion exists among the judges of this court, the evidence will be reviewed in some detail." Interestingly enough, the review of the facts "in some detail" consisted of over one-third of the opinion being devoted to the discussion of the testimony of petitioner's co-defendant and her husband.

stantive count which flowed therefrom it was essential that the Government prove that he affirmatively and by his own acts and agreement became a direct party to the conspiracy or directly and knowingly aided or abetted in the commission of the substantive offence. *United States* v. *Stromberg* (2nd Cir), 269 F. 2d 256; *Dickerson* v. *United States* (8th Cir.), 18 Fed. 887; *United States* v. *Koch* (2nd Cir.), 113 F. 2d 982; *United States* v. *Ah Kee Eng* (2nd Cir.), 241 F. 2d 157; *United States* v. *Peoni* (2nd Cir.), 100 Fed. 401. Absent this, criminality cannot attach.

Any inference, be it one of guilt or innocence, be it based upon circumstantial or direct evidence, as long as it relates to her or her husband's testimony, cannot be applied to Arthur Athens. He cannot and should not be vicariously convicted on the exculpatory testimony of a co-defendant testifying on her own behalf.

It is unquestionably true that a co-defendant or co-conspirator may, by direct testimony, incriminatory in character, bind his co-defendant or co-conspirator. There is no known case wherein unfavorable inferences may be drawn because the testimony of a co-defendant is "essentially incredible".

Adopting the principle laid down in *United States* v. *Peoni, supra*, to wit: That one must, to be guilty, "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." There is found a total absence of such evidence in the case against petitioner. No unfavorable inference may be drawn from, nor is circumstantial criminality established when it was proved that petitioner flew from New York to Texas with Mrs.

Curtis, that he supplied $50.00 needed toward the rental of an automobile or that he registered in a hotel with her as husband and wife, nor does in any way the receipt of four phone calls by petitioner from Mrs. Curtis establish any unfavorable inference, particularly with the record barren concerning the nature of the phone calls. The fact that he made mis-statements originally to the Customs Agent at a time when he did not know the nature or reason for their interrogation of him created no unfavorable inference.[9]

B. The improper use on summation of the improperly received testimony of Betty Lou Collins destroyed any vestige of a fair trial that might have existed in respect to petitioner.

Since petitioner himself did not take the stand rebuttal evidence was admissable only against his co-defendant, Curtis. Rebuttal evidence must be pertinent and related to the issues involved and not concern itself with collateral matter or mere credibility.

Mrs. Curtis, while a witness in her own behalf, did testify on cross-examination that she did not know of any trip taken to Texas or Mexico by petitioner. This clearly was collateral and not of any great import in respect to the testimony of Mrs. Curtis.

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[9] In *United States* v. *Bufalino et al.*, 2nd Cir. (1960) 285 F. 2d 408, Chief Judge Lumbard in the opinion for the court said:

> "Even an otherwise law abiding citizen who is stopped and interrogated by police, *and who is given no reason for his detention and questioning*, may feel it his right to give as little information as possible and even perhaps to respond evasively if he believes he might thereby be earlier rid of police inquiry." (Emphasis supplied.)

Without objection, the government was permitted, through Mrs. Collins, to establish that petitioner had, in fact, in August, been in the State of Texas and rented an automobile. He stated at the time of rental that he planned a trip into Mexico. If one were to assume arguendo that this testimony was proper rebuttal in respect to Mrs. Curtis' testimony, by no stretch of the imagination could one claim it pertained to or could be considered in connection with petitioner.

In fact the testimony was not in any way contradictory of that given by Mrs. Curtis. By establishing that petitioner had been in Texas did not in any manner establish the fact that this was known to Mrs. Curtis or should have been known to her. By establishing that petitioner had stated at the time he rented the automobile in question that he planned a trip into Mexico did not in fact establish that petitioner had gone to Mexico, nor did it establish knowledge on the part of Mrs. Curtis.

This improper evidence standing alone received without objection would, it is respectfully submitted, constitute "real error". There can, however, be no doubt or question that the use made of this evidence by government's counsel in his summation was real error properly objected to. Not only was it error but it was magnified and compounded by the statement of the Court when proper objection was made.[19]

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[19] "And yet the evidence that we brought in before you this morning shows that he came down to Texas *on what was essentially the same sort of expedition* as the one that you have heard about here. He came down, he rented a car in San Antonio.

Mr. Fitzgibbon: We object to that, if your Honor please. He says essentially the same type of trip that took place here, inferring that he came down to look for marijuana.

(cont'd)

In *Deutch* v. *United States*, 6 L. ed. 2d 936, Mr. Justice Stewart, in writing the opinion of this Court, which reversed the judgment of conviction, quoted at length and with approval from the opinion in *Watkins* v. *United States*, 354 U.S. 178, 1 L. ed. 2d 1273, 77 S. Ct. 1173, the following language which appears at p. 208:

> "One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure."

This single bit of improper evidence was, by the summation of the United States Attorney and the response of the trial judge to petitioner's objection, highly prejudicial to petitioner and inflammatory. The net result was that the Government contended before the trial jury and in its argument before the Court of Appeals that this evidence established:

a. Curtis and her husband-witness lied. The Government asserted that either they did know Athens had made a trip into Mexico, or, if they saw him several times a week they should have known it.

b. That Athens in fact did make a trip into Mexico.

Mr. Butler: I think that is in evidence.

The Court: I think he is drawing that inference, and and what is your objection?

Mr. Fitzgibbon: We object to that statement, if your Honor please.

The Court: *I believe counsel may argue to that effect.*

Mr. Butler: He rents the car from a different car rental agency in San Antonio and *he goes into Mexico and he comes back out again, and he got away with it.*" (Emphasis supplied.)

c. That he made this trip for illegal purposes and is evidence of prior criminal acts on the part of Athens.

d. That the illegal purpose was for the importation into the United States of marihuana from Mexico.

e. That Athens in fact did import in August, 1960, marihuana from Mexico into the United States.

f. That the plan and modus operandi was the same as allegedly used by Curtis in October, 1960.

g. That therefore the trial jury could infer that Athens had conspired with Curtis to illegally import marihuana into the United States from Mexico in October, 1960.

h. That he did in fact aid and abet her in an attempt to import such contraband into the United States.

Actually this evidence proved none of the foregoing, nor could the inferences suggested been properly drawn from this evidence, even if the evidence had been admissible.

If suspicion were sufficient to convict even that would have been found to be lacking in the instant case. (*United States* v. *De Vito, et al.*, 68 F. 2d 837, 2d Cir., 1934; *Gracefo* v. *United States*, 46 F. 2d 852.)

It is virtually impossible to conceive of a more classic example of piling inference upon inference than is demonstrated by the above. Disregarding for the moment the fact that the testimony of Mrs. Collins was not proper rebuttal in the case against the co-defendant Curtis and conceding, solely for the sake of argument, but not admitting, that it might have been proper rebuttal in respect to Curtis, there is evident here a piling of inference upon inference second

to none. In *Direct Sales Company* v. *United States*, 319 U. S. 703, 711; 87 L. Ed. 1674, 1681, this Court in discussing the tendency of piling inference upon inference in conspiracy cases quoted from a previous opinion the following:

> "This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." *United States* v. *Falcone*, 311 U. S. 205, 85 L. ed. 128.[11]

The rationale in both the *Direct Sales* case and the *Falcone* case in respect to a charge of conspiracy is equally applicable to a charge of aiding and abetting in a substantive crime, the second count of the indictment in the instant case.

The prejudices against petitioner can not be disregarded on the theory that this was an extended trial and, therefore, this slight error could not be said to have influenced the jury against petitioner. As was pointed out earlier, the trial consumed approximately a day and a half in all and the witness, Mrs. Collins, had testified on the very morning of the day when the United States Attorney referred to her testimony in his summation.

C. The swearing and questioning of Detective Ahearn required the granting of petitioner's application for a mis-trial.

Following the procedure used in the calling of Mrs. Collins as a witness in rebuttal, the Government called to the stand Detective Ahern of the New York City Police Department and proceeded, over the objection of peti-

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[11] *See Ingram* v. *United States*, 360 U. S. 672, 680; *United States* v. *Ross*, 92 F. Supp. 432.

tioner's counsel, to attempt to question Ahern concerning a statement allegedly made by petitioner to him concerning petitioner's use of marihuana.

In his offer of proof to the Court counsel for the Government demonstrated the basic illogical and unfair approach and direction of the Government's prosecution in respect to petitioner.[12]

The Court was of the opinion that it was improper rebuttal testimony but that it would have been admissible in the Government's case in chief, the reasoning of the court being that "it would tend to show a motive and a purpose on the part of Athens to have committed the offense of which he is charged" (R. p. 217). Obviously, this is ridiculous, since even if it did establish petitioner smoked marihuana, it certainly would not establish smuggling of approximately 100 lbs. of marihuana into the United States, unless it was claimed petitioner was the greatest and most persistent "chain smoker" in the world.

The Court of Appeals saw nothing wrong with the calling of Ahern as the Government's witness and went so far

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[12] "Mr. Butler: As I understand, the witness will testify that, in this conversation, Athens told him that he had been smoking marijuana for three or four months, which would have covered the period of time involved in this conspiracy count and the (*sic*) substantive count here. Clearly, the matter would have been admissible in the case in chief, but I think it is also proper (*sic*) rebuttal testimony in view of the statements from the witness stand of the defendant Curtis and of her husband (R. p. 215) that they were closely connected with the defendant Athens, so closely that they saw him every day, and he was closer than a brother; that they knew nothing about his use of marijuana, and that the only purpose for this trip of coming to Texas was for Athens to accompany Curtis on the trip. This shows that there is another motive, and therefore rebuts their statements" (R. p. 216).

as to state in its opinion that his testimony might have been developed at greater length as proper rebuttal. They also quarreled with counsel's failure to do more than move for a mistrial and held that counsel should have applied for an Instruction to the jury or a striking of the question and answer given.[13]

The question and answer plus the preliminary introductory examination was obviously calculated to prejudice the jury against petitioner and no cure by Instruction or Charge existed; nothing short of granting the motion for a mistrial could have guaranteed to petitioner the fair trial he had a right to expect, even though he was a stranger to the area in which the case was tried.

Recently there has grown a practice among prosecuting attorneys of attempting to introduce as rebuttal evidence, evidence which might or which might not have been offered in the Government's case in chief. The purpose of this is obvious, namely: to furnish a dramatic conclusion to and to bolster an obviously weak or non-existent case. This has been condemned by our appellate Courts: *United States* v. *Hirsh*, 74 F. 2d 215 (2d Cir.).

This practice becomes even more obviously improper when it is exercised in a trial of short duration, as was petitioner's trial.

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[13] After preliminary examination establishing that Ahern was a detective, member of the Police Force of the City of New York for over 8 years, 5 years of which consisted of specializing in narcotic work, and that he had spoken to petitioner November 30, 1960 in New York City, the following question and answer appears in the record:

"Q. And was anything said in that conversation concerning Athens' use of marijuana? A. There was."

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

February, 1962.

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APPENDIX

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18882

ALBERTA EDELSTEIN CURTIS AND ARTHUR ATHENS

Appellants,

versus

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

(December 21, 1961)

Before TUTTLE, Chief Judge, and HUTCHESON and RIVES, Circuit Judges.

RIVES, Circuit Judge: Upon a jury's verdict, the appellants, defendants, were adjudged guilty under both counts of an indictment, the first charging conspiracy to smuggle

marihuana into the United States and to transport and conceal the same in violation of Section 176a, Title 21, United States Code,[3] and the second charging the substantive offense of smuggling into the United States 100 pounds of marihuana in violation of said section 176a. Arthur Athens (hereafter Athens) was committed to the custody of the Attorney General for a period of 10 years, and Alberta Edelstein Curtis (hereafter Mrs. Curtis) was sentenced for a period of 5 years.

On appeal they insist that there is insufficient evidence to support the convictions, particularly that of Athens, and that various procedural errors require a reversal of the convictions of both appellants.

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[3] In pertinent part,

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Appendix—Opinion of the Court of Appeals.

I. *Sufficiency of the Evidence*

It is well settled that a conviction must be sustained if, taking the view most favorable to the Government, there is substantial evidence to support it.[2] That means "whether, taking the view most favorable to the Government, a reasonably minded jury might accept the relevant evidence as adequate to support a conclusion of the defendant's guilt beyond a reasonable doubt."[3] This is a circumstantial evidence case, and in such cases this Court clings to the test that the inferences reasonably to be drawn from the evidence must be not only consistent with guilt of the accused but inconsistent with every reasonable hypothesis of his innocence.[4] It is, however, important to note, as said in *Vick v. United States*, 5 Cir., 1954, 216 F. 2d 228, 232, that:

> "In such cases the test to be applied on motion for judgment of acquittal and on review of the denial of such motion is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude."

Under the applicable test, there is no serious insistence on the insufficiency of the evidence to support the conviction of Mrs. Curtis under the second count, the substantive.

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[2] Glasser v. United States, 1942, 315 U. S. 60, 80; Krull v. United States, 5 Cir., 1957, 240 F. 2d 122, 137, 138.

[3] Lambert v. United States, 5 Cir., 1958, 261 F. 2d 799, 801; Riggs v. United States, 5 Cir., 1960, 280 F. 2d 949.

[4] Cuthbert and Busby v. United States, 5 Cir., 1960, 278 F. 2d 220; Riggs v. United States, supra.

offense.[5] In the automobile which she drove from Mexico across the International Bridge into Laredo, Texas, the customs agents found, stuffed horizontally between the springs of the rear seat and concealed in the left front and left rear door panels, 181 packages each containing approximately 8 to 9 ounces of marihuana. If the jury could reasonably conclude that her possession of that marihuana was a knowing possessing, then that evidence was sufficient to authorize her conviction unless she explained that possession to the satisfaction of the jury. 21 U.S.C.A. §176a, quoted in n. 1, supra.

"Possession" must, of course, be a knowing possession.[6] The statute itself requires that the smuggling be done "knowingly." 21 U.S.C.A. §176a. The learned district judge charged the jury in clear and explicit terms to that effect.[7]

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[5] We assume without deciding that, if Athens was improperly convicted, Mrs. Curtis' conviction under the first count charging conspiracy could not stand in the absence of evidence that there was some other conspirator. United States v. Gordon, 3 Cir., 1957, 242 F. 2d 122, 125; Cf. Bryant v. United States, 5 Cir., 1941, 120 F. 2d 483, 485; West v. United States, 5 Cir., 1947, 161 F. 2d 452. See also other cases collected in Note 554, Title 18, §371, United States Code Annotated.

[6] Guevara v. United States, 5 Cir., 1957, 242 F. 2d 745, 746, 747. Eason v. United States, 9 Cir., 1960, 281 F. 2d 818, 820.

[7] "It must have been smuggled knowingly into this country. The defense here, on the part of the defendants, is that the marijuana, which is shown, I think without doubt, to have been in the vehicle which Mrs. Curtis was driving—the defense is that it was placed there by some third person unknown to these defendants, that neither of the defendants either were a party to placing it there and that neither of the defendants knew it was there. The defense theory, as I understand it, is that this was an innocent trip to Texas and into Mexico, and that while the vehicle was out of Mrs. Curtis' possession, while it was in the garage or while some friend or other person was using

The circumstances were such that the jury could properly conclude beyond a reasonable doubt that Mrs. Curtis knew that the marihuana was hid in the car which she was driving. Further, under the evidence, the jury could reasonably find that Athens, though not present, was guilty as a principal of the substantive crime,* and that he and Mrs. Curtis conspired to commit that offense. Because some difference of opinion exists among the judges of this Court, the evidence will be reviewed in some detail.

Mrs. Curtis confronted the customs agent at an unusual hour, 1:00 A.M., professing to be in a hurry to get to her room in a hotel because of a most embarrassing accident, she had wet herself and the front seat of the automobile. One of the custom agents was about to pass her when another happened to place his hand on the rear seat of the car, and to notice that it appeared to be unusually stiff. Lifting up the seat then disclosed packages of marihuana about 8 inches long and about 3 inches in diameter stuffed between the springs. A check of the door panels resulted in the discovery of additional packages of marihuana.

it, someone else placed the marijuana there; and she, nor the defendant Athens, had any reason to believe there was any marijuana in the car. If you accept that view of the matter, then the defendants would not be guilty of smuggling, nor would Mrs. Curtis have had the marijuana in her possession, even though it was in the car. Because if she didn't know it was in the car, if her version of the matter be accepted to you, then she simply is not guilty. Possession is defined as follows: a person has possession of an object when he knowingly has direct physical control thereof. Hence, as I have stated, if she had no knowledge that it was there, she would not have been in possession of the marijuana."

* See 18 U.S.C.A. §2.

Mrs. Curtis denied knowledge of the marihuana. One of the agents testified:

> "Mrs. Curtis said that she and her husband had left New York City on the 28th, and that they had flown to San Antonio, and that in San Antonio she had rented a vehicle. The vehicle was then at the International Bridge. She said that she and her husband then came to Laredo, Texas, and that her husband had business in Laredo and remained in Laredo; that she had decided to go to Monterrey and visit some friends. I asked her who her friends were in Monterrey, and she declined to identify them. I then asked her where her husband was at that time, and she said she supposed he was back in New York, that he had not planned to wait for her return from Monterrey."

While questioning Mrs. Curtis, the customs agents looked through her purse and found several paid bills and meal tickets from Hotel Rio, Monterrey, Mexico, which were introduced in evidence. The bills and meal tickets were in the name of "Helen Ward," and Mrs. Curtis readily admitted to customs agents that she had used that name in Monterrey. In registering at the hotel there she had also given an erroneous address for her residence in New York. The meal tickets showed that three people had eaten at a particular table on the preceding day, October 31, and that the meals and refreshments had been charged to the room occupied by "Helen Ward." The other meal tickets were for "Helen Ward" alone. The bills disclosed four long distance telephone calls made to the occupant of Room 910 of the Plaza Hotel in Laredo, Texas.

The customs agent reached the Plaza Hotel by 2:00 A.M. The occupant of Room 910 proved to be Athens, though the registration for the twin bedroom was in the name of "Mr. and Mrs. Artie Curtis." At that hour, Athens was not in his room, but was drinking coffee in the nearby Southland Cafe. The agents had coffee with him, and placed him under arrest. They then advised him that he was not required to answer any questions, and that, if he did, his answers could be used against him. The following conversation ensued:

> "A. We asked Mr. Athens his name. He stated his name was Arthur Athens. He said he lived in New York, and that he had flown down by himself to Laredo, and that he was staying at the Plaza Hotel. He stated he was visiting friends at the Hamilton Hotel. He identified these friends as the Wilsons. I then told him that we would check the Hamilton Hotel to see if anyone had registered there under the name of Wilson; and that we knew he was registered as Arfie Curtis at the Plaza Hotel; and that we had Alberta Curtis at the International Bridge in possession of marihuana.
>
> "Q. Did he say anything at that time?
>
> "A. He said he didn't know anything about it at that time. He identified Mrs. Curtis as a friend of his employer — I mean a wife of his employer.
>
> "Q. Did he state to you whether he was the Artie Curtis that had registered at the Plaza Hotel?
>
> "A. He admitted that they had registered there as Mr. and Mrs. Artie Curtis.
>
> "Q. What did you do after that, Mr. Morgan?
>
> "A. When we finished our coffee, we went over to the Plaza Hotel, where he picked up his luggage and checked out, and then we went to the International Bridge.

"Q. What did you do when you got to the International Bridge?

"A. We first took Mr. Athens into where Mrs. Curtis was. We asked if this was her husband, and she said it was not, but that he was the man that had come from New York with her.

"Q. Did you then question Mr. Athens again, or did you question either one of them again after that?

"A. We then questioned Mr. Athens and obtained a personal history statement from him, and went into more detail on his activities.

. . . . . .

"A. Mr Athens stated that he was employed in New York at a brewery, and also as a car salesman for Mr. Curtis' husband, Art Curtis, and that the Curtises had asked him to come down to — or actually, to go to Monterrey with Mrs. Curtis; and that he told them that he would not go to Monterrey, but that he would go to Laredo; and that Mrs. Curtis' husband had bought their plane tickets to go to San Antonio; and that after they had arrived in San Antonio, Mrs. Curtis had rented an automobile, and they had then come down to Laredo; where they had checked into the Plaza Hotel; and that the next day, Mrs. Curtis left for Monterrey, and he had stayed here in Laredo to wait for her to return.

"Q. Did he tell you how he expected to get back to New York?

"A. We asked him how he was going back to New York, and he said they planned to fly. And we told him then that Mrs. Curtis had only $44.00 in her possession, and how was she going to get back. He stated that he would buy her ticket back to New York.

"Q. Did you make a demand on either one or both of these defendants for the order form?

"A. I made demand on Mr. Curtis — I mean — pardon me, Mr. Athens. And Customs Agent Rody made demand, in my presence and the presence of Agent Glenn, on Mrs. Curtis, and neither were able to produce the written order form.

"Q. Did you subsequently have occasion to talk to Mr. Athens?

"A. I did, I talked to Mr. Athens and Mrs. Curtis. I don't recall the date. It was the day they made bond here in Laredo, Texas.

"Q. Approximately how many days was that after the first, do you recall?

"A. It was—let's see. The first, I believe, was a Tuesday, and this was a Saturday, which would make it the fifth, I suppose.

"Q. November the fifth?

"A. Fourth or fifth.

"Q. Did the defendant, Athens, tell you anything at that time?

"A. We met at the Southland Cafe and had coffee, and I again told the two defendants that they did not have to answer any of my questions, but I wanted to clear up a couple of points. I asked him what name he had used when he flew down from New York, and he said he had gone by the name of A. Dale. He said Mr. Dale was a friend of his in New York."

Mrs. Curtis testified as a witness in her own behalf and in behalf of her co-defendant Athens. According to her testimony, she was 25 years of age, worked as a professional model in New York City, and in that profession used various names, such as, "Helen Ward," "Bobbi Evans" and "Barbara Curtis." It is customary for professional models to use different names. In August 1959, some fifteen months

before her arrest, she was married to Arthur Curtis, a prominent used-car manager. Within a month after their marriage, she met the defendant Athens. Her husband brought Athens to their apartment. Athens and her husband are like brothers, and "He (Athens) couldn't be closer to me than a brother. I refer to him as such upon introducing him, even." Accumulating the nights, Mrs. Curtis would say that Athens had spent five months out of the year sleeping on the couch in the living room of the Curtis' apartment; ". . . my husband leaves at 7:30 in the morning, and Mr. Athens doesn't go to work until 3:00 o'clock in the afternoon. There is never any qualm about my husband going to work and . . ." During the year she had seen Athens on an average of once a day. When she met him, Athens was employed as a beer tester by the F & M Shaffer Brewing Company. Athens suffered from mononucleosis and took sick leave from his employer due to this illness. He then worked for her husband on a commission basis selling automobiles. She still saw Athens each day during the six weeks or two months before they left for the trip to Mexico.

The customs agents were never able to find the friends Mrs. Curtis had visited in Monterrey. According to Mrs. Curtis, those friends were Nora and Frank Wilson. They were not registered at the same hotel as Mrs. Curtis, and she had not heard from them since that visit. Nora had been a fellow model with whom Mrs. Curtis had formed a friendship in her profession.

> "Q. But you were close friends?
>
> "A. No. No. Friendship is a—sometimes when people have something in common, they naturally

will call it friendship. Nora and I didn't socialize, but we constantly met each other in the cycle of our business, and sometimes we found ourselves booked on the same job together and we went to lunch together. This, I consider a friend. It was closer than an acquaintance, but it wasn't a dear friend."

Mrs. Curtis had never before visited Nora, knew nothing of her background, and they had no mutual friends through whom Nora could be located. She met Nora by accident at lunch in a New York restaurant:

> "We were very excited to see each other. It had been a long time, and we sat down and had lunch together. We just discussed various things. I told here I had gotten married. She told me that she had married quite well, a gentleman named Frank Wilson. He was a saxophone player who had given up the instrument to do arrangement work, and she was doing extensive traveling. I had told her that my husband and I were planning a vacation. We hadn't had one in well over a year and a half, and I had been run-down, not feeling too well. And we had been discussing taking a vacation. As to when and where, we had come to no decision. And she said that she told me that she was going to California and on into Mexico, and it would be a wonderful idea if we could all get together. And I told her that it was impossible for me to give her any decision. I would definitely have to discuss it with my husband. She said it would be a nice way to see the country. We could rent a car and travel. It was great. She was having a wonderful time doing it herself, and that I couldn't possibly get in touch with her, so she took my telephone number and said she would be in touch with me."
>
> . . . . . .

". . . It was about two weeks later that I got a phone call from California, and she had asked me what my plans were, if I was going to follow her suggestion and if we were coming down there, and I told her that my husband was unable to go, but I was pretty sure I could convince him to let me go. So she said that she would make reservations for me at the Rio Hotel in Monterrey. She was going to be down there the weekend of the 28th, and she asked if I thought I was coming down by car. I said that was undecided; I didn't know at that point. Well, that ended that conversation. And again my husband got skeptical, and he said that he wasn't too sure it was a good idea for me going all that distance to these people, this Nora and her husband. He didn't know them, and it was a lot of mileage between New York and Mexico, and he didn't want me to go. Well, there was dickering back and forth, and it was about 4 or 5 days before I actually left, that my husband came up with the idea that Arthur, Arthur Athens should accompany me down there."

Mrs. Curtis admitted telling the customs agent that she did not know whether her husband was still in Laredo or not and said that, while untrue, that statement was made from sheer fright.

"And I had checked into a hotel to take care of somebody who was not my husband, and had checked in as Mr. and Mrs., and I lied. I readily admit it. I was too frightened to do anything else."

Mrs. Curtis explained wetting herself as follows:

"I made a very sad mistake in leaving at night, I can tell you that. The roads were treacherous. It was frightening because it was so absolutely pitch dark.

"By the time I had gotten to the portion of the drive which encircles the mountain—I must assume it circles it, but it is quite a scary, treacherous drive. I was scared to death. I proceeded as cautiously as possible, but it was still very frightening. And I drove all the way. And I was afraid to get out of the car and stop any place, be it along side of the road or into any of the very few restaurants, if I can call them that, on the road. And so, unfortunately, I had an accident. Quite an embarrassing one. Nothing fatal, but nevertheless quite embarrassing one."

In San Antonio, in accordance with a reservation made from New York, Mrs. Curtis had rented an automobile from the Hertz Rental Agency to go into Mexico and return. A $250.00 deposit was required. When Mrs. Curtis had only $200.00, she left the agency a short time and returned with Athens, who put up the additional $50.00.

According to Mrs. Curtis, Athens had been ill on the trip to Laredo. "By the time we got to Laredo, he was just feeling awful, and he looked awful too. I was kind of worried. He had had these attacks before, but I was still very frightened about it. And I said, 'We had better check into a hotel.' And then I came up with the brilliant idea that we should check in as Mr. and Mrs., so I could be as close to him as possible and do what I could for him. So we used my name, Mr. and Mrs. Art Curtis. We went up to the desk clerk, and Artie requested a room with two single beds in it, and the clerk said that he had one, and he gave us the room, and we went upstairs. Mr. Athens got in his bed, and I suggested that we get a doctor, but he didn't want one. He said that it would pass, so I put a cold compress to his head and made him as comfortable as I could, and he fell asleep.

And after he fell asleep, I went into the bathroom and got undressed and into my pajamas and bathrobe, and I went to bed."

Mrs. Curtis' husband testified, ". . . defending not only his honor but her honor." He had made the arrangements for his close personal friend to accompany his wife on this vacation trip. He had made the plane reservation for Athens in the name of "Arthur Dale." "Well, it sounds a little foolish now, but at the time — people that know us in New York know that my relationship with Artie Athens is probably closer than brothers. I don't know why, but at the time I thought that if anybody had seen the passenger list, they might associate some wrong doing, which I knew there was nothing going on, so I just picked a name out of the air and made the reservations that way." He had furnished the money for the trip, and gave Athens $500.00 and his wife either $200.00 or $225.00. According to both Mr. and Mrs. Curtis, the plan was for Athens to accompany Mrs. Curtis into Mexico. Mrs. Curtis testified that Athens' illness required him to remain in Laredo. According to Athens' statement to the customs agents: "He said that he had told Mr. Curtis that he would go as far as Laredo, Texas, with Mrs. Curtis, but he would not go into Mexico with her. We asked him why he told Mr. Curtis that he wouldn't go into Mexico. He said that he didn't want to."

Athens did not take the stand.

The Government undertook to rebut parts of the testimony of the Curtises. They had both testified that, notwithstanding their almost constant association with Athens, they had never heard of him making an earlier trip into Mexico. In rebuttal the Government showed that on August

5, 1960, Athens had rented an automobile in San Antonio for a trip into Mexico, had kept the car until August 9, during which time he had driven it 1057 miles.

The defense theory was that some other person had hid the marihuana in the Hertz rental car. In support of that theory, they showed that a tag on the car keys showed that the car was No. 19 of the Hertz Rental Agency at San Antonio, and that the Rio Hotel in Monterrey is also a Hertz Agency. While in Monterrey the automobile stayed in a parking area exposed to the open street, and was loaned on several occasions to Mr. Wilson. The defense theorized that either Wilson or some other person hid the marihuana in the car, hoping to re-rent it from the Hertz Agency in San Antonio and to recover the marihuana. There is, of course, a possibility that that theory is true, but whether so or not was for the jury to decide. We think it unnecessary to detail the circumstances further in order to demonstrate that the jury could reasonably believe beyond a reasonable doubt that Mrs. Curtis and Athens were engaged in a joint enterprise; and that each of them was guilty under both counts of the indictment.

II. *Claimed Procedural Errors.*

Of the procedural errors relied on for reversal, only two have enough substance to warrant discussion. The first concerns the district court's denial of the defendants' motion for mistrial under the following circumstances. Both of the Curtises had testified that there was no occasion to connect Athens with the use of marihuana. In rebuttal the Government introduced Francis Ahern, a detective in the narcotics bureau of the New York City Police Department,

and showed that he had a conversation with Athens on or about November 30, 1960. "Q. And was anything said in that conversation concerning Athens' use of marijuana? A. There was."

At this point the objection of the defendants that this was not proper rebuttal testimony was sustained. The defendants did not move to exclude the single question and answer, or for precautionary instructions, but did move for a mistrial. The district court denied that motion.

Outside of the presence of the jury, the United States Attorney stated to the court what he expected the witness' testimony to be:

> "As I understand, the witness will testify that, in this conversation, Athens told him that he had been smoking marijuana for three or four months, which would have covered the period of time involved in this conspiracy count and the subsidive (sic) account here. Clearly, the matter would have been admissible in the case in chief, but I think it is also proper rebuttal (sic) testimony in view of the statements from the witness stand of the defendant Curtis and of her husband, that they were closely connected with the defendant Athens, so closely that they saw him every day, and he was closer than a brother; that they knew nothing about his use of marijuana, and that the only purpose for this trip of coming to Texas was for Athens to accompany Curtis on the trip. This shows that there is another motive, and therefore rebuts their statements."

The Court could, we think, have exercised its discretion to admit this testimony. When it had sustained the objec-

tion of the defendants, it certainly did not have to go further and declare a mistrial.

At the conclusion of the evidence the court inquired whether counsel were prepared to argue, and after the United States Attorney had answered in the affirmative, stated: "... You may go forward." The following then occurred:

> "MR. COOK [Assistant United States Attorney]:
>
> "Thank you, your Honor. Ladies and gentlemen, we have been here almost a day and a half now.
>
> "MR. WRIGHT [Defendants' attorney]:
>
> "Your Honor, I'm sorry, I understand the arguments. I apologize for interrupting counsel, but we intended, and overlooked making the request to open and close the arguments because of the burden of proof imposed on us, which the court will impose in the charge. The defense requests the right to open and close.
>
> "THE COURT:
>
> "And why do you request the right to open and close?
>
> "MR. WRIGHT:
>
> "For this reason, your Honor. The court will instruct the jury as to the portion of Article 176-A as to possession. As the court knows, that statute shifts greatly the burden of proof, at least of one of these defendants, and we understand there is no mention in the rules of criminal procedure as to who opens and closes. We believe the common law prevails, and

under the law, the person who has the burden has the right to open and close. We request that at this time.

"THE COURT:

"It would be necessary, it seems to me, for you to even approach the application of that rule for you to make some very damaging admissions, Mr. Wright, on behalf of your clients. And as you have two clients and not one—

"MR. WRIGHT:

"The government has elected to try the persons in one indictment. We believe that, under the law, we would have the privilege and the right.

"THE COURT:

"I will deny the motion.

"MR. WRIGHT:

"Note our exception."

The appellants now argue that the judgment must be reversed because of the court's statement that, "It would be necessary, it seems to me, for you to even approach the application of that rule for you to make some very damaging admissions, Mr. Wright, on behalf of your clients. And as you have two clients and not one—." It does not appear that that statement was even objected to at the time it was made. If there had been any objection, the court possessed ample power to remove from the minds of the jurors any possible harm caused by the statement. Certainly the statement does not constitute plain error necessitating a reversal under Rule 52(b), Federal Rules of Criminal

Procedure. We find no reversible error in the record and the judgments of conviction are

AFFIRMED.

A true copy
Test:

SEAL

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit, New Orleans,
Louisiana

Judgment

Extract from the Minutes of December 21, 1961

No. 18882

ALBERTA EDELSTEIN CURTIS and ARTHUR ATHENS,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be, and the same are hereby, affirmed.

Order Denying Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 18882

ALBERTA EDELSTEIN CURTIS and ARTHUR ATHENS,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

(January 22, 1962.)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and HUTCHESON and RIVES, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

Order Staying Mandate

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18882

ALBERTA EDELSTEIN CURTIS and ARTHUR ATHENS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant ARTHUR ATHENS, in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable said appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from January 22, 1962; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from January 22, 1962 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expira-

tion of thirty days from January 22, 1962 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

RICHARD T. RIVES
United States Circuit Judge.